

## **DISCLAIMER**

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### **COMMONWEALTH OF VIRGINIA STATE CORPORATION COMMISSION**

## **APPLICATION OF**

**C & P ISLE OF WIGHT WATER COMPANY**

**CASE NO. PUE980625**

**For certificates pursuant to § 56-265.2 and  
§ 56-265.3 D of the Code of Virginia**

### **REPORT OF MICHAEL D. THOMAS, HEARING EXAMINER**

**April 12, 1999**

## **HISTORY OF THE CASE**

On July 13, 1998, C & P Isle of Wight Water Company ("C & P" or the "Company") filed an application, pursuant to § 56-265.2 of the Code of Virginia, requesting a certificate of public convenience and necessity to acquire water facilities in the Queen Anne's Court subdivision; to construct water facilities for the Cedar Grove/Quail Meadows area of the Brewer's Creek subdivision; and to construct water facilities for the Carrollton Meadows area of the Ashby subdivision in Isle of Wight County, Virginia. In addition, the Company requested authority, pursuant to § 56-265.3 D of the Code of Virginia, to amend its current certificate of public convenience and necessity (Certificate No. W-283a) to include the above-referenced areas in its service territory. Finally, the Company requested that it be relieved from its obligation to maintain separate usage and cost information for each of its water systems and to provide such information to the Commission on an annual basis.

By letter dated September 1, 1998, the Company requested that consideration of its application to acquire the water facilities in the Queen Anne's Court subdivision be severed from consideration of its application to construct water facilities and serve the Cedar Grove/Quail Meadows and Carrollton Meadows subdivisions.

The Commission entered an order on October 9, 1998, severing the application to acquire the water facilities from the application to construct water facilities and expand the Company's service territory. The Commission subsequently entered an order on November 4, 1998, inviting interested persons to submit written comments or request a hearing on the Company's application to construct water facilities and expand its service territory. The Commission further directed the Staff to conduct an investigation on the application and present its recommendations to the Commission in a report.

By letter dated December 17, 1998, the County of Isle of Wight (the "County"), through its Director of Public Utilities, objected to the issuance of a certificate of public convenience and necessity to the Company for the provision of water service to the Carrollton Meadows subdivision. The County stated that it was extending its water service into this area and that its water line was currently serving the subdivision. The County requested a hearing on the Company's application.

The Commission entered an order on February 5, 1999, scheduling a hearing on the Company's application for March 4, 1999.

At the appointed time on March 4, 1999, this matter came on for hearing. The Company appeared by its counsel Robert W. Jones, Jr., Esquire. The Commission's Divisions of Energy Regulation and Public Utility Accounting appeared by their counsel Robert M. Gillespie, Esquire. The County appeared as a Protestant by its counsel H. Woodrow Crook, Jr., Esquire. A transcript of the hearing is filed with this Report.

## **SUMMARY OF THE RECORD**

In 1992, the Company started purchasing or constructing small water systems in the County. The water systems it purchased were in need of maintenance, repair, or upgrades, which the previous owners were not in a position to accomplish. Since water was not generally available from the County, the Company also constructed water systems. The Company is comprised of five separate water systems located in five separate subdivisions: Ashby/Carrollton Forest, Brewer's Creek, Isle of Wight Industrial Park, Rushmere Shores, and Poplar Forest. The Company serves approximately 223 customers. (Ex. TC-1, at 2-3).

In 1994, the developers of the Ashby subdivision approached the Company and inquired whether the Company would take over their water system and bring it into compliance with state and federal water quality standards. By June of 1995, the Company had designed and constructed Ashby Waterworks, which was the first water treatment system in the County. Later the same year, the developers of the Brewer's Creek subdivision also approached the Company about taking over their water system and bringing it into compliance with state and federal standards. By November 1995, the Company had completed construction of the second water treatment system in the County. At present, the Ashby and Brewer's Creek water systems are the only water systems in the County that comply with all current state and federal water quality standards. The County did not express any interest in acquiring either of the water systems and acquiesced in the Company's purchase of these systems. (Ex. TC-1, at 3-4).

In 1997, the Company received authority to expand the service territory of its Ashby water system into the Carrollton Forest subdivision. The County did not object to this expansion of the Company's service territory. (Ex. TC-1, at 4; Ex. ER-6).

The Company's current application seeks to extend the Ashby water system into the Carrollton Meadows subdivision and the Brewer's Creek water system into the Cedar Grove/Quail Meadows subdivision. (Ex. TC-1, at 3). The County objects to the expansion of the Ashby system into the Carrollton Meadows subdivision. The County has no objection to the expansion of the Brewer's Creek system into the Cedar Grove/Quail Meadows subdivision. (Ex. ER-4, at 1).

The current conflict between the Company and the County had its genesis in December 1996. On December 11, 1996, the developer of the Carrollton Meadows subdivision made a voluntary proffer that was included in his request for rezoning the property. The developer proffered that:

6. Water shall be supplied to the project through distribution lines designed and constructed according to requirement of the Isle of Wight Public Service Authority. The source of the water shall be provided by Isle of Wight County in which case the distribution lines and easements shall be conveyed by the owner as directed by the Isle of Wight County Board of Supervisors.

In the event, however, that Isle of Wight County does not have a source of water available when the distribution system is being developed, then the owner shall be allowed to contract with other water supply sources to serve the system. If the other water supply source requires conveyance of the distribution system to it and the developer does so convey said system, then the developer will be relieved of the requirement of conveying said system to the County of Isle of Wight.

Ex. TC-8, Attachment 2.

Around the time the County approved the developer's request for rezoning, the Company and the developer met, and after conversations with County, they determined that the County did not have water in the area nor did the County have any plans to provide water to the area. The Company and the developer were under the impression the County was not going to provide water to the development. The Company and the developer then entered a Memorandum of Understanding ("MOU") on December 19, 1996. The MOU provided, in part, that the Company would assume all of the engineering costs for preparing the plans and specifications for the expansion of the Ashby water system and the developer would assume the labor and material cost for the modification of the system not to exceed \$500.00 per connection. In addition, the MOU provided that the developer would deed the mains, meters, and associated hardware, including utility easements, to the Company. (Tr. at 19-20; Ex. TC-8, Attachment 3).

By letter dated December 19, 1996, the Company advised the Virginia Department of Health, Office of Water Programs (the "VDH-OWP") that the County ruled the developer could contract with the Company to supply water to the Carrollton Meadows subdivision. The Company further advised the VDH-OWP that it was preparing plans and specifications to expand the Ashby water system to serve the new development and would submit those plans for review in February 1997. (Ex. TC-8, Attachment 4).

On April 30, 1997, the Company submitted the plans and specifications to expand the Ashby pumping plant to the VDH-OWP for approval. (Ex. TC-8, Attachment 5).

The VDH-OWP approved the Company's plans and specifications for the expansion of the Ashby water system on July 31, 1997. The VDH-OWP also issued the Company a Waterworks Construction Permit with an effective date of August 1, 1997. (Ex. TC-8, Attachment 6).

By letter dated August 1, 1997, the developer confirmed the substance of a meeting held between the developer, the Company, and the County's Director of Public Utilities. In the letter, the developer stated it was his understanding that the County would not have water available until the spring or summer of 1998, by the earliest. The developer advised the County that, based on information provided by the County, water from the County would not be available when needed by

the Carrollton Meadows subdivision. The developer further advised the County that he and the Company were going forward to provide water to the project. (Ex. TC-8, Attachment 7).

By letter dated March 30, 1998, the County advised the developer that it would be in a position to provide water to the Carrollton Meadows subdivision. The County further advised the developer to modify his water distribution design to provide for the extension of the County's water system into the subdivision. (Ex. ER-7). The County subsequently provided the developer with a proposed schedule for providing water to the subdivision in a letter dated May 14, 1998. (Ex. TC-8, Attachment 8).

The developer had his attorney respond to the County's May 14<sup>th</sup> letter. In a letter dated June 3, 1998, the attorney advised the County that the developer had kept the County informed of his need to have water prior to October 30, 1998, and, as a result of that need, the developer made certain commitments to secure that water from the Company. The attorney further advised the County that, even if the County could meet its proposed October 30, 1998, completion date, the developer intended to secure his water from the Company. (Ex. TC-8, Attachment 9). The developer suddenly changed his position and on June 11, 1998, his attorney advised the County that the developer understood the County would supply the water to the Carrollton Meadows subdivision. (Ex. TC-8, Attachment 10). Apparently, the developer's sudden change in position regarding his water supplier was prompted by his inability to secure land disturbance permits from the County. (Tr. at 21, 27-28). The County subsequently issued the necessary permits. (Tr. at 67-68).

The Company stopped construction on the expansion of the Ashby pumping plant on June 11, 1998. (Tr. at 21).

On June 18, 1998, the County's Board of Supervisors approved the funding for the extension of the County's water system from its Carisbrooke well to the Carrollton Meadows subdivision. Construction commenced on the water line on August 3, 1998. On August 7, 1998, the VDH-OWP issued a Notice of Violation to the County for commencing construction without a permit. The County provided additional information concerning the placement of fire hydrants along the transmission line to the VDH-OWP and they issued a construction permit to the County approximately three days later. (Ex. TC-1, Attachment 2; Ex. TC-8, Attachment 12; Tr. at 66-67).

The County connected its water line to the Carrollton Meadows subdivision on October 15, 1998. The County is currently providing water to five homes that are under construction in the subdivision. (Tr. at 78-79, 82).

At the March 4<sup>th</sup> hearing, Ted W. Christian, president of the Company, appeared and testified in support of the Company's application. In addition to providing the majority of chronological background set forth above, Mr. Christian testified that the Company could provide water that meets all current state and federal water quality standards at a lower cost than the County. He testified that the Company's average customer uses approximately 8,000 to 10,000 gallons of water in a bi-monthly period. Based on the Company's rates, this customer's rates would be 4% to 8% less than the County's rates. Finally, he testified the water from the County's Carisbrooke well does not meet current state and federal standards for drinking water. (Ex. TC-1, at 5-6, Attachment 3 (Revised)).

On cross-examination, Mr. Christian testified that he was aware of the County's subdivision and zoning ordinance that new developments utilize public water, if the water is available. He further testified that he was aware of the County's efforts to develop public water in the area of the Carrollton Meadows subdivision. He further testified he was aware the developer's rezoning was conditioned on the use of public water, if the water was available. Finally, he testified he was aware of the County's May 14, 1998, letter to the developer advising the developer of the availability of public water. (Tr. at 22-23, 28-29).

The Company also called Daniel B. Horne, engineering field director, VDH-OWP, Southeast Virginia Engineering Field Office, to testify on the quality of the water from the County's Carisbrooke well and the capacity limitations of the well. Mr. Horne testified that the Carisbrooke well is a grandfathered system and, as such, the water from the well may exceed the current state standard for fluoride. He testified all new water well systems have to meet all state-adopted water quality standards, including those for fluoride. He testified the Company's water systems comply with all current state water quality standards. He further testified the permit for the Carisbrooke well only allows for a total of 179 connections. He testified he did not know how many connections the Carisbrooke well was currently serving. (Tr. at 33-35).

On cross-examination, Mr. Horne testified the VDH-OWP and the County were in the process of negotiating a consent order that would address the County's compliance with the state's water quality standards for fluoride. Mr. Horne testified the County would have five years from the date the consent order is issued by the state Health Commissioner to bring its Northern Development Service District water system into compliance. This district includes the Carrollton Meadows subdivision. He testified the VDH-OWP expected to complete its work on the consent order within two weeks of the date of the hearing. (Tr. at 36-37).

The Staff presented the testimony of Gregory L. Abbott, a utilities specialist with the Commission's Division of Energy. The Staff recommended that the Commission grant the Company's application to amend its certificate of public convenience and necessity to expand its service territory. The Staff based its recommendation on the Company's ability to: (1) provide water that meets all current state and federal water quality standards; (2) provide water at lower rates than the County; and (3) currently meet the capacity requirements of the entire Carrollton Meadows subdivision. In addition, the Staff recommended that the Company be required to submit detailed usage and cost data for 1998 as prescribed in the Commission's Final Order in Case No. PUE950062. (Ex. GA-2, at 8; Ex. GA-3, at 4-7).

Mr. Abbott testified that he had two concerns with the County providing water to the Carrollton Meadows subdivision. First, the County failed to demonstrate that its water currently meets state and federal water quality standards. Mr. Abbott noted that the consent order between the County and the VDH-OWP had not been signed. Secondly, the County failed to demonstrate how they would meet the subdivision's capacity requirements. Mr. Abbott noted that the County has not submitted plans or specifications to the VDH-OWP for its Carisbrooke/Benns Church water line. Mr. Abbott testified the County needs this additional capacity to meet the water demand of the Carisbrooke and Carrollton Meadows subdivisions. (Ex. GA-3, at 7; Tr. at 49).

On cross-examination, Mr. Abbott testified that water quality is under the jurisdiction of the VDH-OWP. He further testified that fire protection is not a requirement for a certificate of public convenience and necessity. (Tr. at 51).

Mr. E. Wayne Rountree, director of public utilities, appeared and testified for the County. He testified that beginning in late 1996, the County retained an engineering firm to prepare a water feasibility report for the County to provide water to the entire Northern Development Service District (the "District").<sup>1</sup> He testified the engineering work for 20 to 25,000 feet of 16-inch water mains to serve the District is complete. He testified these water mains would form the backbone of the County's water system in the District. Mr. Rountree testified the County is connecting its water system in the District with the City of Suffolk's system. The County has entered an agreement with the Western Tidewater Water Authority to purchase treated groundwater from Suffolk. He testified the water purchased from Suffolk would meet all current state and federal water quality standards. He testified the County is also in the process of constructing a 1 million-gallon elevated storage tank to serve the District. He testified the County completed its water line to the Carrollton Meadows subdivision and is currently providing water to the subdivision. He testified the County's system has adequate water supply and water pressure to provide fire protection in the form of fire hydrants located along the water line. He testified the developer's proffer for his rezoning required the developer to obtain his water from the County, and also required the developer to convey the subdivision's water system to the County. Finally, Mr. Rountree testified there is no need for the Company to expand its service territory into an area of the County that is being provided public water. (Ex. ER-4; Tr. at 60-62).

On cross-examination, Mr. Rountree testified the Carisbrooke well operating permit allows for 179 connections or 171,600 gallons per day. He testified the well currently serves 157 connections and produces approximately 132,000 gallons per day. He testified the Carrollton Meadows subdivision will ultimately have 78 connections, but the first phase only involves 42 connections. He testified that construction of the elevated storage tank would take nine months to a year to complete and the transmission line to connect the Carisbrooke water system with the Benns Church water system would take four or five months to complete. Mr. Rountree estimated that construction of the storage tank should be completed by July 2000. He also estimated that construction of the transmission line to connect the County's water system with Suffolk's system should be completed by July 2000. (Tr. at 78-83).

## **DISCUSSION**

This case raises the issue whether a private water company should be permitted to construct water facilities and expand its service territory into a new subdivision that is currently being served by a municipal water system. The private water company has the ability to provide water that meets all current state and federal standards for water quality at rates that are on average lower than the municipal water system. In addition, the private water company has the capacity to meet the water needs of the entire subdivision. On the other hand, the municipal water system won the race to be

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<sup>1</sup>The County's Northern Development Service District includes the area from the James River Bridge along Route 17 to the Crittenden Bridge at Chuckatuck Creek, which borders the City of Suffolk. The Service District also includes the area along Route 10 from the border with Suffolk to Benns Church and Smithfield.

the first to serve the new subdivision and the developer of the subdivision has obligated himself to procure the subdivision's water from the municipal water system, if it was available when needed. Although the municipal water system is supplying water to the subdivision that does not meet current state standards for fluoride content, the VDH-OWP will allow the municipality at least five years to bring its system into compliance with state standards. The municipal water system has contracted to purchase water that meets all current state and federal water quality standards, but this water will not be available for at least another year. In addition, the municipal water system has capacity restrictions. The municipal water system may only serve 22 new connections in a 79-lot subdivision before it reaches the maximum number of connections permitted under the operating permit for its well. The municipal water system will not have additional storage capacity for at least another year, and it will take at least four to five months to construct a pipeline to interconnect the system serving the new subdivision with another one of its water systems in order to provide the needed additional capacity.

The statutes governing the resolution of the issue before the Commission provide, in part, that:

It shall be unlawful for any public utility to construct, enlarge or acquire, by lease or otherwise, any facilities for use in public utility service, except ordinary extensions or improvements in the usual course of business, without first having obtained a certificate from the Commission that the public convenience and necessity require the exercise of such right or privilege.

§ 56-265.2 A of the Code of Virginia

If the Commission finds it to be in the public interest, upon the application of a holder of a water or sewer certificate, such certificate may be transferred, leased or amended after such reasonable notice to the public and opportunity to be heard as the Commission by order may prescribe. The Commission may authorize the transfer, lease, or amendment of the certificate subject to such restrictions as the Commission finds will promote the public interest.

§ 56-265.3 D of the Code of Virginia.

The record in this proceeding does not support a finding that the "public convenience and necessity require[s] the exercise of such right or privilege," or that it would be in the "public interest," to permit the Company to construct water facilities to serve the Carrollton Meadows subdivision and include this subdivision in the Company's service territory. The "public interest" would not be served to permit the Company to improve facilities and construct a pipeline to the subdivision when the developer of that subdivision has indicated that he will secure his water from the municipal water system already serving the subdivision. If there are no additional customers to serve, there is certainly no reason to construct or improve a water system to meet nonexistent customer demand. The construction of such a redundant system would be detrimental to the Company's current customers who would have to absorb the cost of construction in their rates without any corresponding revenue stream to offset those costs. If this application was filed in December 1996, and the hearing was held in March 1997, a different result may have been reached.

However, in March 1999, there is no public need for the Company's water system to be expanded into the Carrollton Meadows subdivision. There is certainly room for process improvement in situations such as the one faced by the Company in this case. At the outset, there should be a clear and unequivocal statement from the municipality whether they intend to supply public water to a new subdivision, or not. Small water companies can ill afford the expenditure of personnel resources or capital on ventures that are doomed to fail.

Since there is no other source of water for the Cedar Grove/Quail Meadows subdivision, the Company has demonstrated that the public interest would be served by constructing facilities and expanding their service territory to serve this subdivision.

As respects the Company's request that it be relieved from its obligation to maintain separate usage and cost information for each of its water systems, the Company failed to carry its burden of persuasion that it should be relieved of such requirement.

## **FINDINGS AND RECOMMENDATIONS**

Based on the evidence received in this case, and for the reasons set forth above, I find that:

- (1) The Company's application should be granted in part and denied in part;
- (2) The Company's application for a certificate of public convenience and necessity to construct water facilities in the Cedar Grove/Quail Meadows area of the Brewer's Creek subdivision should be granted;
- (3) The Company's application to amend its service territory to include the Cedar Grove/Quail Meadows area of the Brewer's Creek subdivision should be granted;
- (4) The Company's application for a certificate of public convenience and necessity to construct water facilities for the Carrollton Meadows area of the Ashby subdivision and its application to amend its service territory to include this subdivision should be denied; and
- (5) The Company's request to be relieved from its obligation to maintain separate usage and cost information for each of its water systems and to provide such information to the Commission on an annual basis should be denied.

I therefore **RECOMMEND** that the Commission enter an order that:

- (1) **ADOPTS** the findings contained in this Report;
- (2) **GRANTS** the Company a certificate of public convenience and necessity to provide water service to the Cedar Grove/Quail Meadows area of the Brewer's Creek subdivision of Isle of Wight County;



- (3) **AMENDS** the Company's certificate of public convenience and necessity (Certificate No. W-283a) to include the Cedar Grove/Quail Meadows area of the Brewer's Creek subdivision of Isle of Wight County in the Company's service territory;
- (4) **DENIES** the Company a certificate of public convenience and necessity to provide water service to the Carrollton Meadows area of the Ashby subdivision of Isle of Wight County;
- (5) **DENIES** the Company's application to amend its service territory to include the Carrollton Meadows subdivision;
- (6) **DENIES** the Company's application to be relieved of its obligation to maintain separate usage and cost information for each of its water systems and to provide such information to the Commission on an annual basis; and
- (7) **DISMISSES** this case from the Commission's docket of active cases.

### **COMMENTS**

The parties are advised that any comments (Section 12.1-31 of the Code of Virginia and Commission Rule 5:16(e)) to this Report must be filed with the Clerk of the Commission in writing, in an original and fifteen (15) copies, within twenty-one (21) days from the date hereof. The mailing address to which any such filing must be sent is Document Control Center, P.O. Box 2118, Richmond, Virginia 23218. Any party filing such comments shall attach a certificate to the foot of such document certifying that copies have been mailed or delivered to all counsel of record and any such party not represented by counsel.

Respectfully submitted,

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Michael D. Thomas  
Hearing Examiner